Supreme Court, U.S.
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No. 01 418

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

SHEILA BEW, RAINIER CONLEY, WALTER GRIFFIN, SERINTHIA HILL-PRATT, SAMUEL INGRAM, BARBARA MUSE, VICKI SHY, ANDREA SIMON, AND LEONARD GIBSON, JR.,

Petitioners,

v.

CITTY OF CHICAGO AND IILLINOIS LOCAL GOVERNMENTAL LAW ENFORCEMENT OFFICERS TRAINING BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603

(312) 427-3200
Attorney for Petitioner

4800

QUESTIONS PRESENTED

1. Does the "business necessity" standard of 42 U.S.C. §2000e-2(k)(1)(A) require an employer, who is defending a selection procedure that has a disparate impact on minorities, to show that the procedure is "necessary to safe and efficient job performance."

2. Does the "job related" standard of 42 U.S.C. §2000e-2(k)(1)(A) require an employer, who is defending a selection procedure that has a disparate impact on minorities, to show that the procedure is "demonstrably a reasonable measure of job performance."

3. Is a discriminatory cutoff score impermissible under Title VII unless shown to measure the minimum qualifications necessary for successful performance of the job in question?

INDEX

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 10

TABLE OF AUTHORITIES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 8

Dothard v. Rawlinson, 433 U.S. 321 (1977) 6, 8

Ensley Branch of NAACP v. Seibels, 616 F.2d 812 (5th Cir. 1980), opinion following remand, 31 F.3d 1548 .. 9

Firefighters Institute v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980) 9

Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970) 8

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 5, 7-8

Guardians Association v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980) 9

Jones v. Lee Way Motor Freight, Inc. 431 F.2d 245 (10th Cir. 1970) 5

Lanning v. Southeastern Pennsylvania Transportation Authority, 181 F.3d 47 (3d Cir. 1999) 9-10

Montclair v. Ramsdell, 107 U.S. 147 (1883) 6-7

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) 5-6

United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) 6

United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972) 6

Wards Cove v. Atonio, 490 U.S. 642 (1989) 6

Williams v. Taylor, 529 U.S. 362 (2000) 7

42 U.S.C. §2000e-2(k)(1)(A) ..... passim

Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607.4(c) 8

American Psychological Association, *1999 Standards for Educational and Psychological Testing* 7

PETITION FOR WRIT OF CERTIORARI

Petitioners[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 15, 2001.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-8) is reported at 252 F.3d 891. The opinion of the district court on the merits (App. 11-26) is unreported; the opinion of the district court on plaintiffs' prima facie case (App. 27-34) is reported at 979 F.Supp. 693.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 9) was entered on May 15, 2001. Rehearing was denied on June 7, 2001. (App. 10.)

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. §2000e-2(k)(1)(A) which provides as follows:

> **Sec. 2000e-2. Unlawful employment practices**
> ***
> **(k) Burden of proof in disparate impact cases**
> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if —
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that

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1. Petitioners are Sheila Bew, Rainier Conley, Walter Griffin, Serinthia Hill-Pratt, Samuel Ingram, Barbara Muse, Vicki Shy, Andrea Simon, and Leonard Gibson, Jr.

causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

STATEMENT

Petitioners brought this action under Title VII of the Civil Rights Act of 1964, as amended, after each had been fired by respondent City of Chicago because of an inability to receive a passing score on the "Illinois Law Enforcement Officers Certification Examination," a written multiple-choice test administered by respondent Illinois Local Government Law Enforcement Officers Training Board.

Minorities make up nearly all of those fired because of the certification test: From January 1, 1990 to February 13, 1998, 32 of the 33 police officers that Chicago discharged were minorities.

The "certification test" is taken by Chicago police officers after they have successfully completed a 760 hour instructional course at the police academy. Officers are provided three opportunities to pass the test within the six month period following graduation from the academy. All academy graduates, even those who fail the "certification test," are granted full police powers, required to carry a firearm, empowered to make arrests, receive on-the-job field training and are then assigned to

work as a patrol officer. Each petitioner was competently working as a patrol officer when he (or she) was fired by Chicago because of three failing scores on the "certification test."[2]

Petitioners filed timely charges of employment discrimination with the Equal Employment Opportunity Commission and then brought this action in under 42 U.S.C. §2000e in the district court. Based on the statistical evidence, the district court concluded that petitioners had made out a prima facie case of disparate impact discrimination. *Bew v. City of Chicago,* 979 F.Supp. 693 (App. 27-34.)

Evidence at trial revealed that when the certification test had been pilot tested, about sixty-three percent of incumbent African-American officers had been unable to attain the 132 passing score.[3] (Tr. 123.)

The Training Board defended its certification test as a means of insuring that each police academy graduate had "the knowledge, abilities, and skills to perform as a police officer in the State of Illinois and to receive

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2. The tests consists of 200 questions; a passing score is 132 correct answers. Petitioner Bew missed a passing score by one question; petitioners Simon and Gibson missed a passing score by two questions. Petitioner Griffin missed by eleven questions; Shy missed by nine, Hill-Pratt by eight, Ingram by six, and Muse by eight. (App. 13-14.)

3. The average score of white incumbent officers in the pilot study was 144, compared to 128 for African-American incumbents. (Tr. 121-23.)

certification." (Tr. 43.) The consultant who designed the test testified that there was no data to show that a particular cut-off score would yield a good officer or a bad officer. (Tr. 100.) The consultant could not state that a passing score on the certification test reflected the minimum qualifications necessary for a police officer. (Tr. 118.) The consultant agreed that "we cannot say that answering a set of 200 questions at any fixed percentile level indicates competence." (Id.)

The district court ruled against petitioners. (App. 11-26.) On appeal, petitioners argued that respondents had failed to show business necessity for the requirement that police officers pass a certification test. Petitioners also argued that "job relatedness" required data that an inability to answer 132 questions correctly was a valid predictor of inability to work as a police officer. The Seventh Circuit rejected each of petitioners' arguments, holding that "business necessity" was the same as "job relatedness," (App. 5-6), and concluding that empirical evidence was unnecessary to show that the passing score was job-related. In the view of the court of appeals, job relatedness was shown because the passing score "satisfied the City's desire to certify only well-trained officers." (App. 7.)

REASONS FOR GRANTING THE WRIT

This case raises important and recurring questions that arise when employment decisions are made on the basis of test scores that have a disparate impact on minorities.

42 U.S.C. §2000e-2(k)(1)(A) provides that when an employer uses an employment practice that causes a disparate impact, the employer must demonstrate that the challenged practice is "job related for the position in question *and* consistent with business necessity." (emphasis supplied)

Petitioners argued in the Court of Appeals that "business necessity" required respondents to show a need for the certification test. Petitioners pointed out that each had successfully graduated from the police training academy and that each had been competently performing as a police officer when discharged because of a low test score. Petitioners argued that without some evidence that passing the test was necessary to safe and efficient job performance, this was a case where test scores had become the "masters of reality," rather than "useful servants." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

The Seventh Circuit rejected petitioners' arguments, holding that business necessity is the same as job relatedness, (App. 5), and that the passing score was job related because it "satisfied the City's desire to certify only well-trained officers." (App. 7.)

The decision of the Court of Appeals that business necessity and job relatedness comprise a single standard creates a conflict with 30 years of consistent decisions by this Court and the lower federal courts that an employment practice that has a disparate impact must be justified by "business necessity."

Following *Jones v. Lee Way Motor Freight, Inc.* 431 F.2d 245 (10th Cir. 1970) the lower federal courts have applied the rule that "business necessity" requires

a showing that a discriminatory policy be "necessary to the safe and efficient operation of the business." Id. at 249, See, e.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791, 797 (4th Cir. 1971); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971); Specifically, the policy "must not only foster safety and efficiency, but must be essential to that goal." *United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301, 308 (8th Cir. 1972).

The Court endorsed this strict view of "business necessity" in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), holding that "business necessity" requires that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." Id. at 331 n.14.

Although the Court restated this rule in *Wards Cove v. Atonio*, 490 U.S. 642 (1989) to be that a challenged practice need only serve "in a significant way, the legitimate employment goals of the employer," id. at 659, the Court continued to require "a reasoned review of the employer's justification for his use of the challenged inquiry." Id.

Congress explicitly endorsed "business necessity" when it overruled *Wards Cove* in the 1991 amendments to Title VII. 42 U.S.C. §2000e-2(k)(1)(A) provides that when an employer uses an employment practice that causes a disparate impact, the employer must demonstrate that the challenged practice is "job related for the position in question *and* consistent with business necessity."

The decision of the Seventh Circuit in this case that "business necessity" is the same as "job related" is

contrary to the cardinal principal of statutory construction to give meaning to every clause and word of a statute. *Montclair v. Ramsdell,* 107 U.S. 147 (1883); *Williams v. Taylor,* 529 U.S. 362, 404 (2000).

Requiring an employer to establish that passing a discriminatory written test is essential to its continued operation is consistent with the views of the American Psychological Association. Standard 14.17 of the *1999 Standards for Educational and Psychological Testing* adopted by the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education, provides that the passing score on a credentialing test "should depend on the knowledge and skills necessary for acceptable performance . . and should not be adjusted to regulate the number or proportion of persons passing the test." The goal of a certification test is not to pick out the "best performers," but simply to insure that persons possess "the minimum level of knowledge and skill required." *1999 APA Standards,* 157.

Respondents did not attempt to show any "business necessity" for requiring a certification test. Instead, respondents argued that they were only required to show that the test was job-related. The decision of the Seventh Circuit to accept this argument, (App. 8), deprives the "business necessity" standard of 42 U.S.C. §2000e-2(k)(1)(A) of all meaning and should be reviewed by this Court.

-II-

The definition of "job relatedness" applied by the Seventh Circuit in this case resurrects the standard rejected by this Court in *Griggs v. Duke Power Co.,* 401

U.S. 424 (1971).

At issue in *Griggs* was a decision by a divided panel of the Fourth Circuit that an employer could justify its use of discriminatory employment rules by showing that it had "adopted its educational and testing requirements with a genuine business purpose and without intent to discriminate against future Negro employees." *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1232 (4th Cir. 1970), This standard is identical to that applied by the Seventh Circuit in this case, when it upheld a discriminatory test because the passing score "satisfied the City's desire to certify only well-trained officers." (App. 6-7.)

In *Griggs*, this Court rejected the Fourth Circuit's "genuine business purpose" standard and required that discriminatory tests be "demonstrably a reasonable measure of job performance." 401 U.S. at 436. The Court reaffirmed that "job relatedness" under Title VII is a strict standard in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), when it approvingly quoted from the Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607.4(c), "that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job'" Id. at 431.

The Court applied the *Griggs-Albemarle* job relatedness standard in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), a case involving weight and height standards for correctional counselors. There, the Court held that to establish job relatedness, the employer was required to produce "evidence correlating the height and weight

requirements with the requisite amount of strength thought essential to good job performance." Id. at 33.

Outside of the Seventh Circuit, the lower federal courts have scrupulously applied the *Griggs-Albermarle* job relatedness standard to employment tests. See, e.g., *Ensley Branch of NAACP v. Seibels,* 616 F.2d 812, 822 (5th Cir. 1980), opinion following remand, 31 F.3d 1548 (job relatedness requires "evidence showing that those with a higher test score do better on the job than those with a lower test score"); *Firefighters Institute v. City of St. Louis,* 616 F.2d 350, 359 (8th Cir. 1980) (job relatedness requires "empirical evidence of an association between levels of performance on the multiple choice examination and on the job"); *Guardians Association v. Civil Service Commission,* 630 F.2d 79, 1000-01 (2d Cir. 1980) (job relatedness required evidence that "differences in scores reflect differences in job performance"). With the exception of the Seventh Circuit, the uniform view is that a "discriminatory cutoff score is impermissible [under Title VII] unless shown to measure the minimum qualifications necessary for successful performance of the job in question." *Lanning v. Southeastern Pennsylvania Transportation Authority,* 181 F.3d 47 8, 489 (3d Cir. 1999).

The holding of the Seventh Circuit on job-relatedness is in direct conflict with the decision of the Third Circuit in *Lanning v. Southeastern Pennsylvania Transportation Authority.* There, a police agency required applicants to be able to run 1.5 miles in 12 minutes. This requirement had a disparate impact on female applicants and was challenged under Title VII. After analyzing the meaning of 42 U.S.C. §2000e-2(k)(1)(A) that a employment practice be "job related

for the position in question and consistent with business necessity," 181 F.3d at 485, the Third Circuit held that more evidence was required than the opinion of the test creator that the running requirement was both job related and a business necessity. The rule applied by the Third Circuit is that "judgment alone is insufficient to validate an employer's discriminatory practices." 181 F.3d at 492. Instead, Title VII requires that "a discriminatory cutoff score must be shown to measure the minimum qualifications necessary to perform successfully the job in question." Id. at 493.

The importance of a uniform standard for job-relatedness warrants review by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

September, 2001

KENNETH N. FLAXMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
Attorney for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1867

SHEILA BEW, RAINIER CONLEY, WALTER GRIFFIN, SERINTHIA HILL-PRATT, SAMUEL INGRAM, BARBARA MUSE, VICKI SHY, ANDREA SIMON, AND LEONARD GIBSON, JR.,

Plaintiffs-Appellants,

v.

CITTY OF CHICAGO AND ILLINOIS LOCAL GOVERNMENTAL LAW ENFORCEMENT OFFICERS TRAINING BOARD,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 96 CV 1488—**Rebecca R. Pallmeyer,** *Judge.*

Argued January 18, 2001—Decided May 15, 2001

Before Bauer, Manion and Diane P. Wood, Circuit Judges.

BAUER, Circuit Judge. Plaintiffs, probationary police officers discharged for failing the Illinois Law Enforcement Officers Certification Examination, complain that the exam as administered by the defendants, the City of Chicago and the Illinois Local Government Law Enforcement Officers Training Board, had a disparate impact on African-American and Hispanic (hereafter "minority") officers in violation of Title VII. The parties agree that plaintiffs established prima facie disparate impact. This appeal focuses on whether the City and the Board established that the minimum passing score and the rule that probationary officers pass the exam in three tries ("three strikes rule") satisfied the business necessity standard. We believe that the defendants met their burden of showing business necessity and we affirm the district court's

decision.

I. Background

The Board is charged under state law to enforce the Illinois Police Board Training Act 50 ILCS 705/1 by setting minimum standards for the training of police officers. As part of its efforts, the Board created an exam for probationary officers. After their graduation from the police academy, officers are assigned regular job duties on a probationary basis until they pass the exam. The City administered the exam on a voluntary basis in exchange for additional training monies until 1996, when the exam became mandatory under Illinois law. Plaintiffs are nine of the failing African-American officers.

To develop the certification exam, the Board hired Justex Systems Inc., consultants with experience in peace officer training. Justex surveyed active officers and their supervisors to determine the knowledge and skills essential for entry-level police officers. It then developed performance objectives, and a training curriculum for the police academy, and designed the certification exam to test the new curriculum. Justex employed a multi-step process when developing the exam. Justex designed a multiple-choice exam, each question having four potential answers. It created an 800 question pool. Each question had four possible answers. Justex tested the questions on graduating recruits for six months. After analyzing the results, Justex modified the questions, eliminating or changing some because they were misleading and some because minorities disproportionately chose the wrong answer.

Justex then tackled the task of setting the minimum passing score. Justex created exams which allotted to various subjects the same emphasis they were given in the police academy curriculum. Justex pre-tested the exam on recent graduates who had studied the new curriculum and on incumbent officers who had two to five years of experience on the police force. For minimum score purposes, Justex considered

only the incumbent officers' pre-tests and determined that the average exam score was 145.43 (rounded to 145) out of 200. To effectuate the dual goals of ensuring that probationary officers possessed the requisite knowledge and to avoid failing too many graduates, thereby wasting money that the City had invested in recruit training, Justex determined that the pre-test failure rate should be no higher than 30%.

Justex contacted other police certification boards to determine how they set their minimum scores. Most used standard deviations. Applying this method, Justex calculated that the standard deviation for the incumbents' pre-test scores was 13 points. Setting the passing score at one deviation below the pre-test mean resulted in a cut-off score of 132, or 66% correct. Using this minimum passing score, only 19.6% of the pre-tested incumbent officers failed the exam. Further, Justex was confident that the pass rate of the actual test-takers would exceed that of the incumbent police officers because the real test-takers would (1) be recent graduates, (2) be familiar with the new police curriculum, which the certification exam was specifically designed to test, and (3) possess a strong motivation to study and put forth true effort while taking the exam. After some debate about using a 70% cut-off score, the Board adopted Justex's recommendation for the minimum passing score of 132 or 66%. Probationary officers had three chances to pass the certification exam. The score acted as an absolute cut-off, not a rank-ordering. In some years, all recruits passed the exam.

From January 1990 until February 1998, only 33 of 5,181 probationary officers, less than 1%, failed the exam. Thirty-two, or 97%, of the failing officers were minorities despite the fact that minority officers only comprised approximately 50% of probationary officers. The over-all pass rate for African-Americans was 98.24% as compared to 99.96% for whites.

The City moved for summary judgment arguing that the comparative pass rate of 98.24% for African-Americans legally precluded a finding of disparate impact. Under EEOC guidelines, disparate impact is deemed established if minority pass rates are 80% or less than the pass rate for non-minorities. See 29 C.F.R. sec. 1607.4(D). The district court properly noted that the 80% guideline may be ignored when other statistical evidence indicates a disparate impact. See id. The district court found that the "test for difference between independent proportions" yielded a Z-score more than five standard deviations from the norm, and that this statistic established prima facie disparate impact. The City renewed its motion for summary judgment, arguing that even if plaintiffs could establish a prima facie case of disparate impact discrimination, the City was entitled to summary judgment because the exam and its minimum passing score were business necessities. Again, the district court denied summary judgment and the case proceeded to a trial before the court. At trial, the defendants presented testimony from Thomas Jurkanin, the Board's executive director, who explained how the Board developed the certification exam. He testified that the Board did not have confidence in probationary officers who could not obtain a score of 132. Further, Dr. Larry Hoover, co-owner of Justex, testified. He explained that there is no scientific way to determine a cut-off score which will separate "good" officers from "bad."

The district court ruled that plaintiffs established a prima facie case of disparate impact discrimination, thereby shifting the burden to defendants to prove that the exam and cut-off scores were business necessities. The court found that defendants successfully shouldered their burden because the exam bore a manifest relationship to the job, and the cut-off score was "reasonable, justified and consistent with professional standards."

II. Discussion

Title VII employs a burden-shifting approach for disparate impact claims:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. 2000e-2(k). Plaintiffs chose to proceed under the first option. The district court correctly found that the certification exam created a disparate impact based on race. Defendants do not contest this finding. Our analysis there fore focuses solely on whether defendants have rebutted the prima facie showing by proving that the cut-off score and three strikes rule were job related business necessities.

The 1991 Civil Rights Act codifies the concepts of business necessity and job relatedness "enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." Pub.L. 102-166 sec. 3. *Griggs* does not distinguish business necessity and job relatedness as two separate standards. It states that: "The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the

practice is prohibited." 401 U.S. at 431. To satisfy the standard, an employment test must "bear a demonstrable relationship to successful performance of the jobs for which it was used." See id. We review the district court's decision for clear error.

A. Cut-off Score

The law further refines the business necessity and job related test to apply to cut-off scores. We use the EEOC's standard: "Where cut-off scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force." 29 C.F.R. sec. 1607.5(H). The district court correctly summarized this standard when it stated: "the Certification Exam 'must be scored so that it properly discriminates between those who can and cannot perform the job well.'" *Bew v. City of Chicago,* 2000 WL 343495 at *6 (N.D. Ill. Mar. 31, 2000) (citing *Thomas v. City of Evanston,* 610 F. Supp. 422, 429 (N.D. Ill. 1985)). Explaining how cut-off scores can meet the business necessity requirement, we previously stated that cut-off scores pass muster if, for example, they are based on "'a professional estimate of the requisite ability levels, or, at the very least by analyzing the test results to locate a logical 'break-point' in the distribution of scores.'" *Gillespie v. Wisconsin,* 771 F. 2d 1035, 1045 (7th Cir. 1985) (quoting *Guardians Ass'n of New York City v. Civil Serv. Comm'n,* 630 F.2d 79, 105 (2d Cir. 1980)).

Defendants have shown that the cut-off score is "reasonable and consistent with normal expectations of acceptable proficiency within the work force." The exams mirrored the content and emphasis of the police academy curriculum, creating a correlation between a probationary officer's score and her mastery of the knowledge necessary to be a police officer. Further, Justex adequately ensured the reliability of the exam by pre-testing and modifying questions based on the pre-test results. *See Bryant v. City of Chicago,* 200 F.3d 1092, 1099 (7th Cir. 2000). To determine the cut-

off score, Justex engaged in more pre-testing to determine how incumbent officers performed. Although Justex began considering the standard deviation method of setting cut-off scores because it was an industry standard, Justex explored whether the method met the Board's and City's needs. Particularly, the score satisfied the City's desire to certify only well-trained officers as well as the financial reality that the City had finite training funds and required adequate numbers of officers for staffing purposes. Indeed, given that the overall passing score exceeded 99%, we cannot conclude that plaintiffs' demand to be reinstated is reasonable. To reduce a cut-off score to the point where all test-takers pass likely renders the test a futile exercise because it ceases to act as a measuring device. The cut-off score met the business necessity and job relatedness standard.

Plaintiffs contend the certification exam's cut-off score is arbitrary because it does not separate probationary officers who will adequately perform their jobs from those who will not. As proof, plaintiffs point out that the probationary officers were performing their probationary police duties satisfactorily. However, we do not hold cut-off scores to standards so strict that they must select all good job performers and reject all bad. *See Guardians Ass'n of New York City,* 630 F.2d at 90. Such a standard would be nearly impossible for any test to meet.

B. Three Strikes

Plaintiffs did not challenge the "three strikes rule" explicitly before the district court. Although the three strikes analysis in plaintiffs' brief occasionally appears geared toward the cut-off score, we assume that the "three strikes rule" argument references the requirement that probationary officers pass the certification exam in three tries or less. The City argues that plaintiffs' "three strikes" argument is waived. The City is technically correct that the three strikes argument is new. However, when a new argument supports a claim made before the district court, we will usually address

it. *See Yee v. City of Escondido,* 503 U.S. 519, 534-35 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). Challenging the passage requirement generally is not a separate claim from contesting the minimum passing score. Both are arguments in support of the claim that the certification exam as administered violates Title VII. Of course, a party cannot add new facts to the record, but here, the three strikes argument grows out of the facts presented to the district court.

The three strikes argument is inextricably connected with the validity of the certification exam and the propriety of the minimum score. Plaintiffs readily admit and the district court correctly found that the certification exam was job related and content valid. In light of this finding and our holding that the cut-off score was appropriate, it stands to reason that defendants may require probationary police officers to pass the certification exam. In other words, requiring plaintiffs to pass an exam, which, despite its disparate impact, is in all ways permissible under Title VII, comports with the business necessity and job related standards. *See Griggs v. Duke Power Co.,* 401 U.S. at 436 ("Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."). Defendants' generous policy of allowing probationary officers three opportunities to pass the exam does not impact the legal result.

For the foregoing reasons, we AFFIRM the district court's decision. Like the district court, we find it unnecessary to address whether the Board is an employer for the purposes of Title VII because the plaintiffs have not otherwise sustained their Title VII suit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1867

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Plaintiffs-Appellants,

v.

CITTY OF CHICAGO AND IILLINOIS LOCAL GOVERNMENTAL LAW ENFORCEMENT OFFICERS TRAINING BOARD,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 96 CV 1488—**Rebecca R. Pallmeyer,** *Judge.*

[May 15, 2001]

JUDGMENT — ORAL ARGUMENT

Honorable William J. Bauer, Circuit Judge
Honorable Daniel A Manion, Circuit Judge
Honorable Diane P. Wood, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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[June 7, 2001]

ORDER

Honorable William J. Bauer, Circuit Judge
Honorable Daniel A Manion, Circuit Judge
Honorable Diane P. Wood, Circuit Judge

On consideration of the petition for rehearing and petition for rehearing *en banc,* and the addendum thereto, filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHEILA BEW, RAINIER CONLEY, WALTER GRIFFIN, SERINTHIA HILL-PRATT, SAMUEL INGRAM, BARBARA MUSE, JEAN A. MOORE, VICKI SHY, ANDREA SIMON, AND LEONARD GIBSON, JR.,

Plaintiffs,

No. 96 CV 1488

v.

CITTY OF CHICAGO AND IILLINOIS LOCAL GOVERNMENTAL LAW ENFORCEMENT OFFICERS TRAINING BOARD,

Defendants

MEMORANDUM OPINION AND ORDER

PALLMEYER, J.

Plaintiffs are former African-American probationary police officers with the Chicago Police Department ("CPD") who were discharged because of their inability to pass the Illinois Law Enforcement Officers Certification Exam (the "Certification Exam"). In this action against the City of Chicago (the "City") and the Local Government Law Enforcement Officers Training Board (the "Training Board"), Plaintiffs allege that the Certification Exam has a disparate impact on minority probationary police officers in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Upon the completion of a bench trial, for the reasons set forth below, the court enters judgment in favor of Defendants.

FINDINGS OF FACT

1. Plaintiffs filed this lawsuit on March 14, 1996. On November 5, 1997, Plaintiffs filed their Second Amended Complaint against the City and the Training Board, alleging that the Certification Exam has an adverse impact on African-Americans and Hispanics and is not job related for the position of police officer in the City of Chicago.

2. The Training Board was created pursuant to the Illinois Police Training Act (the "Act"), 50 ILCS 705/1 et seq., in order to promote and protect citizen health, safety, and welfare. The Training Board is responsible for encouraging and aiding municipalities in their efforts to raise the level of law enforcement by upgrading and maintaining a high level of training and standards for law enforcement executives and officers.

3. Pursuant to the Act, the Training Board developed a Certification Exam that it administers to probationary police officers throughout the state. The Training Board is also responsible for scoring the Certification Exam. The Certification Exam consists of 200 multiple choice questions. In order to pass, a probationary officer must score at least 66%, or answer correctly 132 of the 200 questions. The cut-off score is a flat score, not a "curve"; thus, the 132 minimum score does not have the effect of ensuring the failure of any probationary officers.

4. CPD probationary police officers remain in probationary status for one year. For approximately twenty-one weeks of that period, the probationary police officers are assigned to the CPD Training Academy. After graduation from the Training Academy, the probationary police officers are detailed to the field for the remainder of their probationary period. Probationary police officers are then required to take and pass the Certification Exam. Each probationary police officer is provided with three opportunities to pass the Certification Exam.

5. Plaintiffs are African-American individuals who were formerly employed by the City as probationary police officers. While employed as probationary officers, each plaintiff graduated from the Chicago Police Academy after having completed the initial phase of the CPD training, including maintaining a minimum average score of 70% on weekly academy exams, and satisfactorily concluding field training.

6. Plaintiff Bew took the Certification Exam on October 17, 1994, November 21, 1994, and January 17, 1995. Bew scored 55.5%, 61.5%, and 65.5% respectively on the three administrations of the Certification Exam. The Training Board determined that Bew failed the Certification Exam on each of these dates. The CPD terminated Bew on February 6, 1995.

7. Plaintiff Griffin took the Certification Exam on November 21, 1994, January 17, 1995, and February 21, 1995. Griffin scored 56.5%, 60.5%, and 50.2% respectively on the three administrations of the Certification Exam. The Training Board determined that Griffin failed the Certification Exam on each of these dates. The CPD terminated Griffin on March 9, 1995.

8. Plaintiff Shy took the Certification Exam on November 14, 1994, February 21, 1995, and March 20, 1995. Shy scored 61.5%, 59.5%, and 56.5% respectively on the three administrations of the Certification Exam. The Training Board determined that Shy failed the Certification Exam on each of these dates. The CPD terminated Shy on March 24, 1995.

9. Plaintiff Hill-Pratt took the Certification Exam on December 20, 1994, February 21, 1995, and March 20, 1995. Hill-Pratt scored 62%, 60%, and 61.5% respectively on the three administrations of the Certification Exam. The Training Board determined that Hill-Pratt failed the Certification Exam on each of these dates. The CPD terminated Hill-Pratt

on April 6, 1995.

10. Plaintiff Ingram took the Certification Exam on January 19, 1995, March 20, 1995, and April 17, 1995. Ingram scored 56%, 57%, and 63% respectively on the three administrations of the Certification Exam. The Training Board determined that Ingram failed the Certification Exam on each of these dates. The CPD terminated Ingram on May 13, 1995.

11. Plaintiff Muse took the Certification Exam on February 16, 1995, March 20, 1995, and April 17, 1995. Muse scored 62%, 61.5%, and 58% respectively on the three administrations of the Certification Exam. The Training Board determined that Muse failed the Certification Exam on each of these dates. The CPD terminated Muse on April 28, 1995.

12. Plaintiff Simon took the Certification Exam on October 17, 1996, December 16, 1996, and January 21, 1997. Simon scored 58.5%, 60%, and 65% respectively on the three administrations of the Certification Exam. The Training Board determined that Simon failed the Certification Exam on each of these dates. The CPD terminated Simon on July 12, 1997.

13. Plaintiff Gibson took the Certification Exam on January 17, 1997, February 18, 1997, and April 21, 1997. Gibson scored 65%, 63.5%, and 64% respectively on the three administrations of the Certification Exam. The Training Board determined that Gibson failed the Certification Exam on each of these dates. The CPD terminated Gibson on June 13, 1997.

14. Between January 1, 1990 and February 13, 1998, 5,181 individuals took the Certification Exam. Each of the 5,181 probationary police officers was required to pass the Certification Exam before being certified as a police officer in the State of Illinois. Of the 5,181 probationary officers

taking the Certification Exam, 2,711 (52.3%) were White; 1,590 (30.7%) were African- American; 784 (15.1%) were Hispanic; and 96 (1.9%) were of other races or national origins.

15. During this time period, thirty-three of the 5,181 probationary officers were determined by the Training Board to have failed the Certification Exam on the third attempt, and were terminated by the CPD. Thirty-two of the thirty-three (96.67%) probationary officers who were terminated by the CPD for failing to pass the Certification Exam were non-Whites. Of these thirty-three individuals, twenty-eight (84.85%) were African-American; four (12.12%) were Hispanic and one (3.03%) was White.

16. The pass rate for African-Americans during this period was 98 .24%; the pass rate for Hispanics during this period was 99.49%. Minority probationary officers had a total pass rate of 98.38%; white probationary officers had a total pass rate of 99.96%.

17. The success rate of African-Americans compared to the success rate of Whites taking the Certification Exam between January 1, 1990 and February 13, 1998 is 98.28%. Under the "80% Rule" set forth in the Equal Employment Opportunity Commission's ("EEOC") Uniform Guidelines on Employee Selection Procedures, '?a] selection rate for any race ... which is less than [80%] of the rate for the group with the highest rate will generally be regarded ... as evidence of adverse impact[.]" See 29 C.F.R. par1607.4(D).

18. Under the "test for differences between independent proportions," set forth in RAMONA L. PAETZOLD AND STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION : 5.07, at 5-14 to 5-15 (1994), the data here yields a Z-score of more than five standard deviations.[1] On

September 29, 1997, Judge Bucklo, to whom this case was previously assigned, entered an order denying the City's Motion for Summary Judgment on the issue of adverse impact. Judge Bucklo employed the "test for differences between independent proportions" and concluded that "plaintiff[s] should be able to establish [adverse] impact on the evidence of statistical significance." *See Bew v. City of Chicago,* 979 F.Supp. 693, 697 (N.D.Ill.1997).

19. Prior to January 1, 1996, although not required by law to do so, the City elected to comply with the mandates of the Act, which requires police officers to pass the Certification Exam in order to be certified as police officers in the State of Illinois. See 50 ILCS 705/8.1. The City elected to comply with the Act based on the financial reimbursement for police training costs provided by the State to police departments in compliance with the Act; the CPD's interest in ensuring that its police officers meet the minium standards set by the Training Board for law enforcement competency in Illinois; and the positive perception associated with state certification. As of January 1, 1996, the City has been required by law to comply with the certification requirements set forth in the Act. See 50 ILCS 705/8.

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1. The Z-score can be calculated using the following formula: the minority pass rate minus the majority pass rate divided by the square root of (the total actual pass rate) multiplied by (the total actual fail rate) multiplied by (1/total number of majority test takers plus 1/total number of minority test takers). Applying the test to the data results in the following calculation: 0.98704--0.99963 divided by the square root of (0.99363) multiplied by (0.00637) multiplied by (1/2470 + 1/2711). The Z- score yielded by this data is -5.696. See PAETZOLD & WILLBORN, §5.07, at 5-14 to 5-15.

20. Under regulations adopted by the Training Board, the Training Board reimburses the City for one half of the cost of training probationary police officers. From July 1990 through June 1998, the City received $14,408,845.63 from the Training Board as reimbursement for police officer training costs. The City continues to receive reimbursement from the Training Board for training costs.

21. Thomas Jurkanin, Executive Director of the Training Board, explained that in 1980, the Training Board embarked on a curriculum development process to be used by police departments in the State of Illinois. The Training Board hired Justex Systems, Incorporated of Huntsville, Texas to develop curriculum and a certification examination to measure mastery of the training material. Justex is a professional firm engaged in providing consultative services in the area of public safety personnel. As part of its work, Justex has completed validation studies for police officer examinations across the nation.

22. Dr. Larry T. Hoover, a co-principal of Justex, explained that in developing the curriculum for the Training Board, Justex conducted a job analysis, taking into consideration the tasks performed by entry-level police officers in the State of Illinois. In collecting job analysis data about the entry-level police officer position, Justex surveyed both incumbents and supervisors. Incumbents provided information regarding the frequency of task performance, and supervisors rated the criticality of performance of each task. Justex then facilitated a workshop with experienced patrol officers from across Illinois to translate job information into behaviorally-expressed worker requirements, which in turn were used to develop training objectives. Justex polled 2,451 patrol officers and 685 supervisors. The Certification Exam was designed as a competency measure to assess the acquisition by probationary police officers of the basic requirements established in the training curriculum.

23. Dr. Hoover explained that Justex began developing the test by writing a test bank consisting of more than 800 questions based on the various units of instruction intended to measure mastery of the training material. These 800 items were then used to make eight versions of the Certification Exam. In determining the appropriateness of the items, Justex pre-tested the examination by administering the test both to incumbent police officers and to recent academy graduates. The test items in the Certification Exam are drawn proportionally to the amount of time spent in training on that subject matter. The City's expert, Dr. McPhail of Jeanneret & Associates, Inc., a professional consulting firm, conducted an analysis of the Certification Exam and concluded that the exam is content valid. Plaintiffs stipulated to the content validity of the Certification Exam, as well as to its job-relatedness.

24. The overall mean score for all eight versions of the exam taken by graduating recruits was 145.43 with a standard deviation of 13.66.[2] Of the 388 graduating recruits taking the pilot exam, 12.6% did not receive a passing score of 66%.[3] The mean scores among the seven of the eight tests administered on a pilot basis ranged from a low of 137.00 to a high of 157.52. Justex determined that this variance was not substantial enough to justify varying the cut-off score by version of the examination. This conclusion was based in part on the decision to allow each probationary officer three opportunities to pass the Certification Examination.

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2. Standard deviation is a test statistic that is used as a way to describe the distribution of scores around the mean or average score.

3. Defendants did not analyze the results of the graduating recruits pilot exam by race.

25. The total mean score of the incumbents taking the pilot exams was 142.52, with a standard deviation of 13.68. The total mean score of White incumbents was 144.39 with a standard deviation of 13.22. The total mean score of African-American incumbents was 128.37 with a standard deviation of 11.76. Thirty-eight African-American incumbents took the pilot test, twenty-four (63.2%) of whom did not earn a passing score of 132. The total mean score for Hispanic incumbents was 141.67 with a standard deviation of 7.5. Of all the incumbents participating in the pilot exam, 19.6% did not score the requisite 132 points. Justex did not gather any data to show that the 19.6% of the incumbent officers who failed the test were not adequately performing their duties as a police officer.

26. Some of the 800 questions were removed from the test bank because a disproportionate number of pilot test takers were selecting a particular incorrect response. Justex also conducted an adverse impact analysis thereby eliminating or revising other test items that non-White pilot test-takers answered incorrectly in a disproportionate number when compared to their white counterparts. In total, fifty items were revised and sixty-five items were eliminated from the bank of 800 questions.

27. Dr. Hoover explained that setting a cut-off score at any fixed percentile of 200 questions cannot necessarily ensure competence. In other words, Dr. Hoover stated that it would be practically impossible to gather data showing conclusively that a certain cut-off score would yield a good officer as opposed to a bad one.

28. Justex ultimately recommended to the Training Board that the cut-off score for a passing grade on the Certification Exam be 66%, or 132 correct answers. In making this recommendation, Justex did not use the results of the incumbents to establish the means, and therefore to establish the cut-off score. Instead, the cut-off score was calculated by subtracting the standard deviation among the graduating

recruits, 13.66, from the mean score of that same group, 145.43, to arrive at 131.77. That number was rounded up to 132. Also, based on EEOC guidelines that suggest cut-off scores be set at reasonable levels, Justex determined that no more than 30% of incumbents should fail the test. See 29 C.F.R. par. 1607.5(H). Ultimately, the recommended passing score of 66% resulted in the failure of 19.6% of the incumbent test-takers and 12.6% of graduating recruits.

29. In considering the reasonableness of this cut-off score, Justex considered several factors, including standards used by other licensing agencies, the results of the pilot tests, the fact that each probationary officer would be provided with three opportunities to take the examination, the role of chance correct answers, the fact that actual test-takers would have the benefit of having completed the training curriculum providing the basis for the subject matter of the test, and the economic impact on the City of losing probationary officers for whom the City had already expended large training costs.

30. In 1983, the Training Board adopted Justex's recommendation for a cut-off score of 66%. To date, the Training Board continues to apply a cut-off score of 66%, or 132 correct answers.

31. Plaintiffs did not identify an equally valid certification device, and therefore did not submit an alternative for the court's consideration.

CONCLUSIONS OF LAW AND ANALYSIS

A. Standard of Parties' Burdens

1. Title VII establishes a system of shifting burdens of proof in adverse impact cases.[4] In order for Plaintiffs to

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4. The court notes that the burden-shifting paradigm explained in this opinion is the result of Supreme Court case law and congressional amendments to the Civil Rights Act of 1964. In *Griggs v. Duke Power Co.*, 401

establish a prima facie case of disparate impact, they must show that the facially neutral Certification Exam had a significantly discriminatory impact. *See Bryant v. City of Chicago,* 200 F.3d 1092, 1094 (7th Cir.2000). Once Plaintiffs have identified the challenged practice, here the Certification Exam, they must the practice in question has caused the [disparate impact on] ... the membership [of] a protected group." *See Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994 (1988).

2. If Plaintiffs can make this initial required showing, the burden then shifts to the employer who must prove that the Certification Exam is See 42 U.S.C. §2000e-2(k)(1)(A)(i). To satisfy this burden of proof, the employer must establish that all aspects of the Certification Exam, including the scoring system, served a legitimate employer purpose. *See Evans v. City of Evanston,* 881 F.2d 382, 384 (7th Cir.1989). Thereafter, if the employer is successful in validating the evaluation method, the burden shifts back to Plaintiffs to prove that the employer had available another method of

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U.S. 424, 432 (1971), the Court held that the employer has the burden of proving that "any given requirement must have a manifest relationship to the employment in question." Later, the Supreme Court overturned *Griggs* in part by holding that the employer carried a burden of production, not a burden of proof, to establish that the challenged practice served the employer's legitimate goals. *See Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 659 (1989). In the Civil Rights Act of 1991, Congress legislated a response to *Wards Cove,* placing the burden of proof back on the employer to demonstrate that a practice that has a disparate impact be "job related for the position in question and consistent with business necessity." 42 U.S.C. §2000e-2(k)(1)(A)(i).

evaluation which was equally valid and less discriminatory that the employer refused to use. *See Bryant,* 200 F.3d at 1094 (citing 42 U.S.C. §2000e-2(k)(1)(A)(ii); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975)).

B. Disparate Impact

3. Under the "80% Rule" set forth in the EEOC Guidelines, Plaintiffs cannot show that the Certification Exam has a disparate impact on non-White test takers. The ratio of the success rate of African-American test takers to the success rate of White test-takers is 98.28%; that same ratio between Hispanics and Whites taking the Certification Exam is 99.53%. Both rates are substantially higher than the 80% guideline proposed by the EEOC. See 29 C.F.R. par. 1607.4(D). Although the pass rate of all test-takers, including minority test-takers, is extremely high, the fact remains that of the thirty- three who failed during the relevant year, thirty-two were non-White probationary officers.

4. As Judge Bucklo pointed out in her ruling for summary judgment on the issue of disparate impact, the 80% Rule is not binding on this court, and may be ignored where that rule indicates a lack of disparate impact, but the disparity is nonetheless statistically significant. *See Bew,* 979 F.Supp. at 696-97. In accordance with Judge Bucklo's ruling, Plaintiffs should have the option of showing disparate impact by statistical significance. *See id.* at 697 (quoting PAETZOLD & WILLBORN, §5.07, at 5-19 to 5-20). Applying the test for difference between independent proportions to the facts here yields a Z-score of more than five standard deviations. This data therefore supports a prima facie case of disparate impact. *See id.* at 696 (citing *Castaneda v. Partida,* 430 U.S. 482, 496 n. 17 (1977) (prima facie case established where Z-score is greater than two or three standard deviations)).

C. Job-Relatedness and Business Necessity

5. Under 42 U.S.C. § 2000e-2(k)(1)(A)(i), the City and the Training Board must show that the challenged exam is job related for the position in question and consistent with business necessity. Employment tests that produce a disparate impact are prohibited under Title VII unless "they are demonstrably a reasonable measure of job performance." *See Bryant,* 200 F.3d at 1098 (quoting *Griggs v. Duke Power Co.,* 401 U.S. 424, 436 (1971)). The parties do not dispute that the Certification Exam is job-related or that it is content valid. The evidence here supports the parties' stipulation with respect to the issue of job-relatedness and test validity; the court concludes that the Training Board performed an appropriate job analysis by properly studying the work behavior and tasks required for successful performance of the job of police officer, and that the test is related to and representative of the content of the job. *See Thomas v. City of Evanston,* 610 F.Supp. 422, 429 (N.D.Ill.1985) (citations omitted). As such, the Certification Exam bears a "manifest relationship to the employment in question." *See Griggs,* 401 U.S. at 432.

D. Scoring System

6. As part of its burden in showing business necessity, however, Defendants must establish that the Training Board's method of scoring the Certificate Exam served a legitimate employer purpose. In other words, the Certificate Exam "must be scored so that it properly discriminates between those who can and cannot perform the job well." *See Thomas,* 610 F.Supp. at 429 (N.D.Ill.1985) (citing, *inter alia, Guardians Ass'n of New York City v. Civil Service Comm'n,* 630 F.3d 79, 94-95 (2d Cir.1980)). Under EEOC Guidelines, a cut-off score expectations of acceptable proficiency within the workforce." See 29 C.F.R. par. 1607.5(H). A cut-off score is reasonable and justified if it is based on "a professional estimate of the requisite ability levels, or, at the very least by analyzing the test results to locate a logical *See Gillespie v. State of Wisconsin,* 771 F.2d 1035, 1045 (7th

Cir.1985) (quoting *Guardians,* 630 F.2d at 105). A cut-off score need not be determined with exact precision; for example, Defendants "need not show that one who scores a [132] would be a good officer and one who scores a [131] would be a bad one." *See Thomas,* 610 F.Supp. at 431. Nevertheless, the evidence must support Defendants' contention that a cutoff score of 66% effectively predicts job performance. *See id.*

7. Plaintiffs have produced evidence tending to show that the cut-off score is unreasonable by showing that qualified people who performed adequately in the academy and in field training still fail the Certification Exam. This evidence is not conclusive on the issue, however. As a practical matter, certification or licensing procedures within most professions will inevitably result in the failure of at least some candidates who otherwise have performed adequately in their respective educational contexts.

8. Furthermore, the court concludes that Defendants have met their burden of establishing that the cut-off score is reasonable, justified and consistent with professional standards. In determining the cut-off score, Defendants considered a variety of factors. First, the court notes that Defendants performed a thorough job analysis before developing the curriculum. The questions on the Certification Exam are representative of the training curriculum, and are drawn proportionally from the training content. Therefore, there is some correlation between a higher passing score and better job performance.

9. Second, the City administered the exam on a trial basis to both incumbent police officers and recent police academy graduates. Defendants analyzed the resulting data in light of the fact that actual scores will likely be higher given that probationary officers required to take the exam would have a greater incentive to do well, and would have had the benefit of recent participation in the training

curriculum upon which the Certification Exam was based. In analyzing this data further, Defendants attempted to delete items that had a disparate impact on non-White test-takers. Finally, although Defendants did not gather data about the adequacy of the job performance of the approximately 20% of incumbents who failed the Certification Exam, Defendants did not use the incumbents' scores to arrive at a mean or at a cut-off. Instead, Defendants considered the fact that less than 20% of the incumbents failed the test, although these test-takers presumably had little incentive to perform well on the Certificate Exam. Defendants also reasoned that providing probationary police officers with multiple opportunities to take the Certification Exam would help control any naturally occurring error on the part of the test-taker or the exam.

10. Third, Defendants reviewed qualitative information from other certification and licensing environments, including passing scores used for law enforcement tests in other states in arriving at the cut-off score.

11. Fourth, Defendants took into account judgmental considerations in arriving at a reasonable cut-off score. Specifically, Defendants balanced the need to staff police departments adequately and the cost-benefit ratio of retaining those officers whom the City had spent money to train against the serious and potentially life-threatening outcomes of errors committed on the job.

12. Finally, at a passing score of 66%, the passing rate for all Chicago police officer recruits during the relevant time period was over 99% and the passing rate for African-American Chicago police officer recruits was over 98%. Because there is no dispute that the Certification Exam is valid, a line had to be drawn at some meaningful point. Given the very high success rates of all probationary officers, regardless of race or national origin, the court concludes that a cut-off score based below 66% would effectively render meaningless the purpose of this job-related Certification

Exam.

13. Ultimately, the cut-off score was selected based on a careful balancing of competing considerations including, but not limited to, adverse impact, cost, and the public safety.

E. Less Discriminatory Alternative Method of Evaluation

14. Other than suggesting that the cut-off score be lowered, Plaintiffs have not identified any equally valid evaluation method or device with a less discriminatory impact. Plaintiffs' bare assertion of the existence, feasibility, or efficacy of alternative selection methods, or an alternative passing score, without supporting data, fails to satisfy their burden of demonstrating that a lower cut-off score would be without similar undesirable discriminatory effects or that it would serve Defendants' legitimate interests. *See Gillespie,* 771 F.2d at 1045.

F. Rule 19 Joinder

15. Defendants argued at trial that the action should be dismissed for Plaintiffs' failure to join essential parties, namely the State of Illinois and the individual members of the Training Board. Because the court has determined that Plaintiffs are unable to sustain a Title VII disparate impact claim, the court need not reach this issue.

CONCLUSION

Judgment is entered in favor of Defendants.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHEILA BEW, RAINIER CONLEY, WALTER GRIFFIN, SERINTHIA HILL-PRATT, SAMUEL INGRAM, BARBARA MUSE, JEAN A. MOORE, VICKI SHY, ANDREA SIMON, AND LEONARD GIBSON, JR.,

Plaintiffs,

No. 96 CV 1488 *v.*

CITTY OF CHICAGO AND IILLINOIS LOCAL GOVERNMENTAL LAW ENFORCEMENT OFFICERS TRAINING BOARD,

Defendants

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

The African-American plaintiffs, Sheila Bew, Rainier Conley, Walter Griffin, Sergintha Will-Pratt, Samuel Ingram, Barbara Muse, Jean Moore,[1] and Vicki Shy, were Chicago probationary police officers.[2] The City discharged them because of their inability to pass the Illinois Law Enforcement Officers Certification Examination ("Certification

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1. Jean A. Moore was named in the complaint by mistake. Accordingly, her complaint is dismissed.
2. The following facts are undisputed. The defendant asks me to deem admitted certain of its 12(M) Statement facts. I address this issue in a separate minute order.

Examination''). The plaintiffs claim that the exam has a disparate impact on the minority probationary police officers, in violation of Title VII of the Civil Rights Act. 42 U.S.C. : 2000e et seq. The defendant has moved for summary judgement, arguing that some of the plaintiffs have failed to exhaust administrative remedies and that all have failed to provide statistical evidence sufficient to establish a prima facie case of disparate impact. For the following reasons, the motion is denied.

-I-

Prior to filing a Title VII suit, the plaintiff must exhaust administrative remedies. First, she must file a charge with the Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged unlawful employment practices. *Gilardi v. Schroeder,* 833 F.2d 1226, 1229-32 (7th Cir.1987). Upon receipt of an EEOC Right-to-Sue letter, the plaintiff must file suit within 90 days. *Id.* at 1233; 42 U.S.C. § 2000e-5(f)(1). The defendant asserts that Mr. Conley and Ms. Bew never filed EEOC charges. However, the plaintiffs have submitted copies of the EEOC charges filed by these individuals on May 11, 1995 and May 5, 1995, respectively, within the required period after their employment was terminated. The plaintiffs have also submitted a copy of a June 30, 1996 Request for Notice of Right to Sue, transmitted by the Chicago EEOC office to the U.S. Department of Justice, listing Mr. Conley and Ms. Bew as charging parties. The present suit was filed on March 14, 1996. Therefore, the plaintiffs timely exhausted their administrative remedies.[3]

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3. The complaint alleges and I assume for the purposes of this motion that Ms. Bew and Mr. Conley actually received their Right-to-Sue letters. However, given the date of the request of the Right-to-Sue letters, June 30, 1996, it appears that the suit commenced before the letters were issued. This fact does not undermine the exhaustion of administrative remedies. *See Plummer v. Chicago Journeyman Plumbers,* 452 F.Supp. 1127, 1139-40

-II-

To make out a prima facie case of disparate impact, the plaintiff must show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). The plaintiff "'must begin by identifying the specific employment practice that is challenged'." *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 656, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989) (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994, 108 S.Ct. 2777, 2788-89, 101 L.Ed.2d 827 (1988)). The employment practice at issue is the Certification Examination; upon failing this exam, a probationary police officer is fired. "Once the employment practice ... has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson,* 487 U.S. at 994, 108 S.Ct. at 2788-89.[4] The plaintiff may demonstrate that "statistical disparities [are] sufficiently substantial [to] raise ... an inference of

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(N.D.Ill.1978), *rev'd on other grounds,* Eggleston v. Chicago Journeymen Plumbers, 657 F.2d 890 (7th Cir.1981). Ms. Bew and Mr. Conley are given 20 days to submit copies of their Right- to-Sue letters.

4. If the plaintiff makes out a prima facie case of disparate impact, the burden of producing evidence shifts to the defendant. *Wards Cove Packing Co.,* 490 U.S. at 658, 109 S.Ct. at 2125. At this juncture, the City argues only that the plaintiffs have failed to establish a prima facie case that the Certification Examination has a disparate impact on minority probationary police officers.

causation'' through standard deviation analysis. Id. at 995 & n. 3, 108 S.Ct. at 2789 & n. 3. This analysis determines whether the disparity at issue is likely to have resulted from chance. *Coates v. Johnson & Johnson,* 756 F.2d 524, 536-37 n. 11 (7th Cir.1985).

For statistical evidence to be probative, it must be drawn from the correct pool or sample. *Wards Cove Packing Co.,* 490 U.S. at 650-51, 109 S.Ct. at 2121-22. When a test operates as a pass-fail barrier, as is the case here, the proper pool consists of those taking the test. *See Connecticut v. Teal,* 457 U.S. 440, 442-44, 452, 102 S.Ct. 2525, 2528-29, 73 L.Ed.2d 130 (1982). The parties agree that the pool here properly consists of 4071 majority and minority probationary police officers who took the Certification Examination between 1990 to 1996. The undisputed data in the present case are summarized in the following table:

	Pass	**Fail**	**Total**	**Pass Rate**	**Fail Rate**
Minorities	1965	28	1993	1965/1993	28/1993
Whites	2077	1	2078	2077/2078	1/2078
Total	4042	29	4071	4042/4071	29/4071

Relying on *Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 308 n. 14, 97 S.Ct. 2736, 2742 n. 14, 53 L.Ed.2d 768 (1977), and *Castaneda v. Partida,* 430 U.S. 482, 496-97 n. 17, 97 S.Ct. 1272, 1281 n. 17, 51 L.Ed.2d 498 (1977), the plaintiffs employed standard deviation analysis and compared the observed and the expected number of minority failures.[5]

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5. Specifically, the parties agree that 49 percent (1993 divided by 4071) of the probationary police officers who took the test are minority. Therefore, the expected number of minorities among the 29 test takers who failed is 14.21 (.49 times 29). The actual or observed number of minority failures is 28. The difference between the observed and the expected number is 13.79. The standard

Unfortunately, the particular statistical technique employed by the Court in *Castaneda* and *Hazelwood* cannot be applied to cases [such as the one at bar] concerning ... differences in pass-fail rates in employment tests. The [plaintiffs' method] is appropriate when evaluating the likelihood of a result composed of a series of events, each with only two possible outcomes, such as the selection of either a black or a white from the relevant population .... Elaine W. Shoben, *Differential Pass-Fail Rates in Employment Testing,* 91 Harv. L.Rev. 793, 795-96 (1978). The present problem, however, has four possible outcomes--a majority probationary police officer passing and failing and a minority passing and failing. Therefore, a statistical technique known as the test for differences between independent proportions is appropriate. Mack A. Player, *Employment Discrimination Law* at 365 (1988) (citing Shoben, supra). The test for differences between independent proportions yields a Z-score of over five standard deviations.[6]

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deviation of the observed from the expected is approximately 2.7 [square root of the following: total number in the sample, 29 failures, times the representation of minority test takers (1993 divided by 4071 or .49), times the representation of majority test takers (2078 divided by 4071 or .51)]. The difference between the expected and the observed number of minority failures is 13.79 divided by 2.7 or 5.11 standard deviations.

6. The statistical calculation can be done either of two ways, but the result is the same. *Compare Player, supra,* at 365 with Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* §5.07, at 5-14 to 5-15 (1994). I have utilized the method described in Paetzold & Willborn. The minority pass rate (P_{mi}) is 1965 divided by 1993 (.98595); the majority (P_{mj}) is 2077 divided by 2078 (.99952). The number of minority probationary police officers who took the test is N_{mi} (1993) and of the majority probationary police officers, N_{mj} (2078). The total actual pass rate is 4042 divided by 4071 (.99288);

The disparity between the minority and the majority pass rates is statistically significant. Therefore, the data support a prima facie case of disparate impact. *See Castaneda,* 430 U.S. at 496 & n. 17, 97 S.Ct. at 1281 & n. 17 (prima facie case established where Z- score is greater than two or three standard deviations).

The City counters by comparing the pass rates of minorities and nonminorities using the "4/5th rule." The EEOC guidelines provide that "[a] selection rate for any race ... which is less than four-fifth (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded ... as evidence of adverse impact." 29 C.F.R. par.1607.4(D). The defendant's results, which the plaintiffs do not dispute, are as follows: the pass rate for the majority probationary police officers taking the exam is 99.95 percent. The pass rate for African-Americans is 98.11 percent. The pass rate for Latinos is 99.50 percent. The ratio of the

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the total actual fail rate is 29 divided by 4071 (.00712). The number of standard deviations, or the Z-score, by which the minority pass rate differs from the majority pass rate is calculated as follows:

— [P_{mi} minus P_{mj}] divided by the square root of [(total actual pass rate) times (total actual fail rate) times ($1/N_{mj}$ plus $1/N_{mi}$)]

— [.98595—.99952] / [.99288 x .00712 x (1/1993 + 1/2078)]1/2

— Z-score equals -5.148.

Under this analysis, unlike the "4/5th rule," it does not matter whether pass or fail rates are used. Paetzold & Willborn, *supra,* §8.04, at 8-13 n. 77; Player, *supra,* at 364.

African-American to the majority pass rate is 98.16 percent. The ratio of the Latino to the majority pass rate is 99.55 percent.

The "4/5th rule" is merely a "rule of thumb." *Watson,* 487 U.S. at 995-96 n. 3, 108 S.Ct. at 2789 n. 3. The EEOC guidelines are not binding on the courts. *Aguilera v. Cook County Police & Corrections Merit Bd.,* 760 F.2d 844, 847 (7th Cir.1985). The "4/5th rule" has been criticized by the courts and commentators, *Watson,* 487 U.S. at 995-96 n. 3, 108 S.Ct. at 2789 n. 3 (citing sources), as "insensitive ... to the magnitude of the difference in treatment of the two groups[, and] ... quite sensitive to the particular framing of the issue and, as a result, ... easily ... misunderstood and misapplied." Paetzold & Willborn, supra, §5.06, at 5-10 to 5-11. The EEOC itself recognizes that "[s]maller differences [than twenty percent] in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms." 29 C.F.R. par. 1607.4(D).[7] In the present case, the analysis adopted by the court is designed to determine whether the disparity between the minority and the majority pass rates, yielded by the "4/5th rule," is statistically significant or, put another way, likely to be due to chance. The fact that the difference between the minority and the majority Certification Examination pass rates exceeds three standard deviations argues against chance. *See Hazelwood Sch. Dist.,* 433 U.S. at 308 n. 14, 97 S.Ct. at 2742 n. 14 (citing *Castaneda,* 430 U.S. at 496-97 n. 17, 97 S.Ct. at 1281 n. 17) (hypothesis that disparity is due to chance is suspect if Z-score is greater than two or three standard deviations). "Plaintiffs should have the option ... of demonstrating [disparate] impact by statistical significance instead of the four-fifth rule.... [and] where the four-fifth rule indicates lack of [disparate] impact [,] but the disparity is statistically significant, the plaintiff should be able to establish [disparate] impact on the evidence of statistical significance." Paetzold & Willborn, supra, §5.07, at 5-19 to 5-20.

Conclusion

For the reasons stated above, the defendant's motion for summary judgment is denied. Ms. Bew and Mr. Conley are given 20 days to submit copies of their Right-to-Sue letters.